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No. 03-184

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CLAUDE M. BALLARD AND MARY B. BALLARD
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF ON THE MERITS

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QUESTIONS PRESENTED

In this case, the trial was conducted by a "Special Trial Judge," an employee-at-will of the Tax Court who serves at the pleasure of its Chief Judge. The Special Trial Judge was required to create a report of factual and legal findings, but his Tax Court Rule 183 report has never been made available to the parties, the public, or the reviewing Article III courts. Instead, his superiors on the Tax Court either overruled his factual findings or persuaded him to change his mind, thus creating a factual finding of tax fraud and income tax deficiencies. This entire process took place off the record, and came to light only in subsequent conversations between two Tax Court Judges and counsel for another party.

The questions presented are:

1. Whether this secretive process is consistent with the Due Process Clause or the right to effective Article III review?

2. Whether this secretive process is consistent with 26 U.S.C. § 7482, which provides that Article III courts must review Tax Court decisions just as they would decisions of a U.S. district court?

RULE 14.1(b) STATEMENT

The following are the parties to the proceeding in the Court of Appeals for the Eleventh Circuit:

1. Claude M. Ballard
2. Mary B. Ballard
3. Commissioner of Internal Revenue, United States Department of the Treasury

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CLAUDE M. BALLARD AND MARY B. BALLARD
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF ON THE MERITS

BRIEF FOR PETITIONERS

Claude M. and Mary B. Ballard respectfully request that this Court reverse the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on February 13, 2003, which affirmed the United States Tax Court.

OPINIONS BELOW

The opinion of the court of appeals is reported at 321 F.3d 1037 (CA11 2003) and is reprinted in the Appendix to the Petition for Writ of Certiorari. The opinion of the Tax Court is reported at *Investment Research Associates, Ltd. v. CIR*, 1999 Tax Ct. Memo LEXIS 463, 78 T.C.M. (CCH) 951 (1999), and is reprinted in relevant part in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The court of appeals issued its judgment on February 13, 2003 and denied rehearing on May 5, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 26 U.S.C. § 7482(a)(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article III, § 1:

The judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Constitution, amend. V:

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

26 U.S.C. § 7482(a)(1):

The United States Courts of Appeals . . . shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury . . . .

Tax Court Rule 183:

Except in cases subject to the provisions of Rule 182 or as otherwise provided, the following procedure shall be observed in cases tried before a Special Trial Judge:

(a) Trial and Briefs: A Special Trial Judge shall conduct the trial of any such case assigned for such purpose. After such trial, the parties shall submit their briefs in accordance with the provisions of Rule 151. Unless otherwise directed, no further briefs shall be filed.

(b) Special Trial Judge's Report: After all the briefs have been filed by all the parties or the time for doing so has expired, the Special Trial Judge shall submit a report, including findings of fact and opinion, to the Chief Judge, and the Chief Judge will assign the case to a Judge or Division of the Court.

(c) Action on the Report: The Judge to whom or the Division to which the case is assigned may adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part, or may direct the filing of additional briefs or may receive further evidence or may direct oral argument, or may recommit the report with instructions. Due regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct.

STATEMENT OF THE CASE

The IRS alleged that Claude Ballard and Robert Lisle, former Prudential Life Insurance Co. of America ("Prudential") real estate executives, and their respective spouses committed fraud in various tax years by failing to report personal income. Pet. App. at 41a-42a. According to the IRS's theory, the income in question was jointly "earned" by the Ballards and the Lisles as part of a complex scheme involving their friend and tax attorney, the late Burton W. Kanter. Kanter was a well-known tax attorney, a part-time law professor at the University of Chicago, a businessman with widely varied interests, and a regular (and often successful) adversary of the IRS for many years.[1] Pet. App.

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[1] Indeed, the IRS has engaged in an extraordinary pursuit of Kanter. The IRS and the Tax Court have created the "Levenfeld/Kanter Project" to describe the continuing scrutiny of Kanter. The circumstances in this

at 45a-49a. Reduced to its essence, the IRS speculated that entities desiring to do business with Prudential had to pay for the privilege by bribing Ballard and Lisle through corporations set up and controlled by Kanter.

It was undisputed at trial that corporations controlled by the Kanter family received remuneration from, *inter alia*, five entities seeking to do business with Prudential. However, rather than being forwarded on to the Ballards and Lisles, these funds were instead duly reported by Kanter's corporations and remained in the corporations (with only certain minor business exceptions) as part of Kanter's lawful personal tax planning. In all events, the Ballards never received any income as a result of these payments.

The Five-Week Trial Before Special Trial Judge Couvillion

The consolidated trial of the Ballards and the other taxpayers took place over a five-week period in the summer of 1994. Pursuant to Tax Court Rule 183, the trial was conducted by a "Special Trial Judge" ("STJ") named Irwin Couvillion, who was the only judge to hear the testimony and observe the witnesses. Pet. App. at 33a. As an STJ, Couvillion has no fixed term of service and is instead an at-will employee of the Tax Court, serving at the pleasure of its Chief Judge. *See* 26 U.S.C. § 7443A(a) (providing for appointment of Special Trial Judges at discretion of Tax Court's Chief Judge). Judge Couvillion and the other STJs are paid 90% of the salary of a regular Tax Court Judge.

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particular case speak for themselves. For example, in addition to the highly irregular process employed before the Tax Court and discussed below, the Tax Court *sua sponte* attempted to impose additional penalties upon the Lisle Estate ***after*** the Fifth Circuit reversed the Tax Court's finding of fraud for lack of evidence. The Fifth Circuit rebuked this effort and issued an order warning the Tax Court against "mak[ing] yet another reversal necessary." *See* Appendix to this Brief.

The five-week trial over which Judge Couvillion presided involved testimony from some fifty-five witnesses and resulted in a transcript of over 6,000 pages in length. Because fraud was at issue, the assessment of the credibility of this lengthy parade of witnesses was central to the outcome of the case. Judge Couvillion was the only judicial officer present at the trial, and no rule or statute requires any other Tax Court Judge to review the trial transcript. All of the many witnesses called to testify about the five transactions in question swore they had not been required to pay for influence or assistance in obtaining Prudential's business.[2] Indeed, not a single witness testified that they had ever sought, received, or paid for Ballard's influence at Prudential.

Judge Couvillion expressed significant doubts concerning the Government's fraud case from the bench at trial, angrily noting at one point that "you are claiming fraud, and when you . . . start dumping 2,000 documents and saying, 'All right the fraud is all in this,'" before he was cut off by the IRS's lawyer.[3] Judge Couvillion later observed that "it seems to the Court that somehow or another [the IRS] is attempting to throw the audit process into the Court's hands, and the Court is not willing to do an audit."[4] The STJ admonished the IRS on the quality of its fraud case, warning that "[t]o be honest, if you want to establish fraud, you better specify and come down to specifics and don't throw a bunch of documents at me."[5] Judge Couvillion would later complain, "the cases are

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[2] Joint Appendix ("J.A.") at 11-24 (Tax Court Trial Transcript (hereinafter "Tr.") at 420-21, 713-15, 2188, 2192, 2669-70).

[3] J.A. at 17-18 (Tr. 2218).

[4] J.A. at 16-17 (Tr. 2216-17).

[5] J.A. at 18-19 (Tr. 2220-21). The judge later noted, "Just because you put the check in the record does not necessarily establish your proof; it may or it may not." The IRS counsel responded, "I certainly have had a lot of trials where I put lots of evidence in and it didn't prove anything." J.A. at 22-23 (Tr. 2973-74).

not being presented in a fashion that lawyers who are skilled . . . in tax law should know about . . . here we are drifting along and I don't know where the hammer is going to fall, but it is going to fall at a certain point . . ., and somebody will not have presented their case."[6]

The Original Findings of Fact

After concluding this long and evidently frustrating trial, Judge Couvillion prepared a report, pursuant to Tax Court Rule 183(b), containing his factual findings and recommended legal conclusions. While, as discussed below, Judge Couvillion's Rule 183 report itself is not part of the record, uncontradicted record evidence shows that this report included factual findings and credibility determinations supporting the Ballards' innocence. Pet. App. at 308a-09a. Further, the same uncontradicted record evidence indicates that Judge Couvillion's Rule 183 report found the Ballards and the other taxpayers ***not guilty*** of tax fraud or underreporting of income. *Id.* Judge Couvillion's Rule 183 report was then filed with the Tax Court on September 2, 1998, after which the Chief Judge of the Tax Court assigned the case to Tax Court Judge Howard A. Dawson, who eventually issued the opinion of the Tax Court. *Investment Research Assocs., Ltd. v. CIR*, 1999 Tax Ct. Memo LEXIS 463, 78 T.C.M. (CCH) 951 (1999) (Pet. App. at 19a). That opinion purports to be written by STJ Couvillion and "adopted" by Judge Dawson. Indeed, the language of the opinion suggests that it is identical to the Rule 183 report filed by Judge Couvillion; "The Court agrees with and adopts the opinion of the Special Trial Judge, ***which is set forth below***." Pet. App. at 33a (emphasis added). There is no indication in the Tax Court's opinion itself that any modifications or alterations were made to Judge Couvillion's Rule 183 report.

[6] J.A. at 20 (Tr. 2332).

The Opinion as Released

The Tax Court's final opinion, as released to the parties and the reviewing Article III courts, however, found the Ballards and the other taxpayers ***guilty*** of underreporting income and of tax fraud for the years in question, notwithstanding the uniform live testimony to the contrary and the lack of any actual receipt of the money by any of the taxpayers. J.A. at 7; Pet. App. at 265a-66a; 287a-89a; 294a-95a. Amazingly, despite its voluminous length, the Tax Court's opinion fails to explain why or on what basis the exculpatory testimony heard at trial was rejected. Instead, the opinion spends over two hundred pages ostensibly tracking the "flow of the money" and rarely even mentioning the testimony at trial—let alone explaining why it was not credited. Pet. App. at 19a-295a.

Critically, as the IRS apparently conceded at oral argument before the Eleventh and Seventh Circuits,[7] Judge Couvillion's original factual findings had been ***changed*** without any explanation and without any record being made of the changes. The IRS's evident concession at oral argument that these changes to Judge Couvillion's Rule 183 report did, in fact, occur confirms the substance of the uncontradicted record evidence introduced by the taxpayers. Pet. App. at 308a-09a. These unexplained and off-the-record changes were made at the direction of a regular Tax Court Judge, who was certainly not present at trial and who may or may not have reviewed the over-6,000 page transcript.

Thus, what purports on its face to be an opinion ***adopting*** Judge Couvillion's Rule 183 report, *see* Pet. App. at 33a, was

[7] An audio recording of the *Kanter* oral argument can be found on the Seventh Circuit's website at http://www.ca7.uscourts.gov/farg/arg.fwx?caseno=01-4316&submit=showdkt&yr=01&num=4316. The Eleventh Circuit does not release transcripts to the parties, but this Court would presumably be allowed access to those materials.

actually an opinion ***reversing*** the report. The reasons underlying Judge Couvillion's apparent acceptance of the changes to his Rule 183 report are not recorded anywhere and remain unknown.

The Tax Court's refusal to make a record of its reversal of Judge Couvillion's original fact-finding report stems from a unique and relatively recent change to Tax Court procedure embodied in Tax Court Rule 183. Prior to 1984, the record of the Tax Court's rejection or modification of an STJ's report was made known to both the parties and the reviewing courts. However, perhaps anticipating that Article III courts would soon require regular Tax Court Judges to conduct "clear error" review of the STJ's factual findings,[8] the Tax Court amended its rule so as to prevent the creation of any record of its rejection or modification of the STJ's report. In other words, the Tax Court modified Rule 183 so as to make it impossible for an appellate court to determine whether the STJ's factual findings were properly subjected to "clear error" or any similiar standard of review.

The Taxpayers Pursue Explanation of the Outcome and Article III Review

Frustrated by the unexplained and radical modification of Judge Couvillion's Rule 183 report, the Ballards and the other taxpayers filed a series of motions asking that the report be released or, in the alternative, that it be made part of the record (under seal if necessary) to permit appellate review.[9]

[8] Indeed, this is precisely what the D.C. Circuit held shortly thereafter in *Stone v. CIR*, 865 F.2d 342, 346-47 (CADC 1989), concluding that "the Tax Court should have reviewed the Special Trial Judge's factual findings according to a clearly erroneous standard."

[9] In seeking the Rule 183 report, the Ballards and the other taxpayers relied on an affidavit filed under penalty of perjury by Kanter's counsel, Randall Dick, in which Mr. Dick recounted conversations in which two Tax Court Judges revealed to him that Judge Couvillion's report had been reversed. *See* Dick Affidavit, Pet. App. at 308a-10a. Notably, the Tax Court *never* denied that Mr. Dick's affidavit was accurate, or that Judge Couvillion's factual findings had been reversed at some point before issuance of the Tax Court's opinion. Neither the Tax Court nor the IRS has challenged or contradicted Mr. Dick's affidavit. Nor has the Tax Court taken any action against Mr. Dick, who remains a member in good standing of the Tax Court Bar. Surely if Mr. Dick's affidavit was anything other than accurate, this would not be the case.

J.A. at 8-9. The Tax Court denied all these motions, and the report remains secret to this day—even from this Court.[10] J.A. at 8-9.

On July 24, 2001, Judge Dawson entered the final decisions of the Tax Court against the Ballards, who timely appealed to the Eleventh Circuit J.A. at 9. IRS counsel conceded at oral argument before the Eleventh Circuit that it had *no* evidence to support its original theory that Judge Couvillion had found fraud and tax deficiencies from the beginning. Instead, the IRS speculated—in a theory advanced for the first time at oral argument—that even if Judge Couvillion's Rule 183 report found no fraud or taxes due, he *later changed his mind* due to an off-the-record, *ex parte* "conference" with Judge Dawson (*i.e.*, one of his employers and a non-attendee of the trial). Thus, when the Tax Court purported to "adopt" Judge Couvillion's opinion, it was

[10] On August 30, 2000, the Tax Court issued an order signed by Special Trial Judge Couvillion, Judge Dawson, and the Chief Judge of the Tax Court denying the third and final motion. It merely restates:

> Judge Dawson states and Special Trial Judge Couvillion agrees, that, after a meticulous and time-consuming review of the complex record in these cases, Judge Dawson adopted the findings of fact and opinion of Special Trial Judge Couvillion, that Judge Dawson presumed the findings of fact recommended by Special Trial Judge Couvillion were correct, and that Judge Dawson gave due regard to the circumstance that Special Trial Judge Couvillion evaluated the credibility of witnesses.

T.C. Order of Aug. 30, 2000, Pet. App. at 315a. As discussed *infra*, the accuracy of this statement is in doubt.

technically correct in that Judge Couvillion had apparently by then come to disagree with his own original factual findings and credibility determinations, albeit for reasons that are not explained in the record or anywhere else.[11]

The Eleventh Circuit's decision was issued on February 13, 2003. *Ballard v. CIR*, 321 F.3d 1037 (CA11 2003) (Pet. App. at 1a). In its opinion, the Eleventh Circuit accepted the IRS's latest interpretation of this case's events, stating that "there is nothing unusual about judges conferring with one another about cases assigned to them," and that, "as a result of such conferences, judges ***sometimes change their original position or thoughts***." *Id.* at 1043 (emphasis added). "Whether Special Trial Judge Couvillion prepared drafts of his report or subsequently changed his opinion entirely is without import insofar as our analysis of the alleged due process violation pertaining to the application of Rule 183 is concerned." *Id.*

The Eleventh Circuit denied a petition for rehearing on May 5, 2003. J.A. at 2; Pet. App. at 307a.

The Ballards sought certiorari on the issue of whether the Tax Court's refusal to divulge Judge Couvillion's original fact-findings to either the parties or the reviewing Article III court constituted a denial of due process, a violation of Article III, or a violation of the statute guaranteeing court of appeals' review of Tax Court decisions. Certiorari was granted to review these questions.

Because appeals from Tax Court cases are taken to the circuit court of appeals in which the taxpayer resides, *see* 26 U.S.C. § 7482(b)(1)(A), the Kanter, Ballard, and Lisle appeals went to different circuit courts of appeals. The Fifth Circuit, which handled the appeal with respect to the Lisles, found the record evidence insufficient to support a finding of

[11] IRS counsel advanced the same novel "changed his mind" theory in oral argument before the Seventh Circuit.

tax fraud. *Estate of Robert W. Lisle v. CIR*, 341 F.3d 364 (CA5 2003). In other words, the Fifth Circuit concluded that regardless of what procedure the Tax Court followed to make its factual decision, that decision was in error because there was insufficient evidence of fraud. As such, the Fifth Circuit tersely and without analysis adopted the Eleventh Circuit's conclusion regarding the constitutionality of Tax Court Rule 183. However, although the Fifth Circuit attempted to avoid creating a direct circuit conflict by suggesting there are evidentiary distinctions between the Ballard and Lisle cases, *id.* at 385 n.39, its holding nonetheless unavoidably undermines the Tax Court's entire factual theory of the consolidated case, by which Ballard, Lisle, and Kanter supposedly all participated in a unified conspiracy to split certain moneys in a 45-45-10 ratio, *see* Pet. App. at 295a. Neither Lisle nor the IRS sought certiorari.

The Seventh Circuit handled attorney Kanter's appeal. On July 24, 2003, the Seventh Circuit issued its opinion in the companion case of *Estate of Kanter v. CIR*, 337 F.3d 833 (CA7 2003), *cert. granted*, __ U.S. __, 124 S. Ct. 2066 (2004); J.A. at 3. In that opinion, the court found no due process violation in the Tax Court's withholding of the Rule 183 report. A lengthy dissent by Judge Cudahy, however, argued that the Tax Court's unprecedented lack of transparency stripped the taxpayers of their right to effective appellate review and thus represented a violation of due process. *Kanter* at 874-88. Even though the Seventh Circuit conducted its review without the benefit of access to the Rule 183 report, it found the Tax Court's final opinion lacking in evidentiary support for one out of the six main factual issues. *Id.* at 854-57.

Following the denial of a petition for rehearing before the court of appeals, Kanter's Estate sought certiorari on similar grounds as the Ballards. J.A. at 4-5. Certiorari was granted, and the two cases are consolidated before this Court.

SUMMARY OF ARGUMENT

Under Tax Court Rule 183, this case was assigned to an STJ for trial. That judge alone heard live, sworn testimony from some fifty-five witnesses, yielding a transcript more than 6,000 pages in length. Contrary to the IRS's theory of the case, all of the witnesses with knowledge of the transactions, including the supposed victims of the alleged "kick back" scheme, flatly denied that anyone had been required to pay anything as a condition of seeking or obtaining business with Prudential. Indeed, during the trial, the STJ was openly critical of the IRS's theory of the case. More important, consistent with the live testimony he heard at trial, the STJ evidently issued a report finding no fraud on the part of any of the taxpayers.[12]

However, the opinion that was ultimately released by the Tax Court to both the parties and the reviewing Article III courts somehow comes to exactly the opposite conclusion—albeit without any explanation of why or how the changes to the secret fact-finding report were made. The Tax Court's opinion gives no hint that it contains anything other than the original, unaltered conclusions of the STJ as "adopted" by a regular Tax Court Judge.

In fact, this is simply not the case: the Tax Court's final opinion represents a complete and unexplained reversal of the STJ's original findings of fact. We know this only because several Tax Court Judges were so offended by the unorthodox "fact-finding" process used in this case that they revealed this off-the-record reversal to a lawyer who was, in turn, willing to make a record that neither the Tax Court nor the IRS has challenged. Pet. App. at 308a-09a.

Notwithstanding the fact that the Tax Court opinion, as released, consumes more than 600 pages, it does not attempt

[12] *See supra* at pp. 6-10.

to explain why the trial testimony of more than a dozen live witness was simply rejected. Nor, more importantly, does it explain ***why*** the factual determinations of the only trier of fact present at the trial and capable of making credibility determinations were rejected.

Despite acknowledging that the original fact-findings must, as a matter of law, be given substantial deference, the IRS and the Tax Court contend that neither the litigants nor the Article III courts—including this Court—are entitled to review the Tax Court's reasons for rejecting or modifying an STJ's original findings of fact. Denying the parties and reviewing Article III courts access to the trier of fact's original findings is without precedent in all of American jurisprudence. Stranger still, neither the Tax Court nor the IRS has identified a meaningful reason for this radical break from universally accepted judicial procedures and the strong public policy in favor of judicial transparency.

No matter which of the IRS's many and shifting explanations for what happened at the Tax Court the Government chooses to put forward before this Court, Tax Court Rule 183 runs afoul of: (1) the statute creating the Tax Court and mandating plenary Article III review, (2) the due process rights of taxpayers, and (3) Article III itself. Litigants facing massive financial liability and the opprobrium of a finding of fraud are entitled to know who decided the facts of their case. Further, if the original fact-findings made by the only judge present at trial are changed, the taxpayers are entitled to a record of those changes and an explanation of why they were made. Finally, consistent with the command of Congress, the taxpayers are entitled to meaningful Article III appellate review of the validity of the changes made to the original fact-findings, with that review conducted on a full record. In all events, by jealously guarding the secrecy of the STJ's original fact-findings, Tax Court Rule 183 deprives the

taxpayers of each of these critical procedural safeguards and thus violates due process.

Fortunately, this denial of due process and meaningful Article III review can be easily and inexpensively remedied, simply by ordering the Tax Court to provide the appellate courts and the parties with a copy of the STJ's Rule 183 report.

ARGUMENT

I. THE TAX COURT'S REFUSAL TO MAKE THE FACT-FINDING AVAILABLE EITHER TO THE PARTIES OR THE APPELLATE COURTS IS ABERRANT

Tax Court Rule 183 is aberrant. As explained in detail in this section, regardless of how it is construed or interpreted, Rule 183 establishes a procedure that is manifestly inconsistent with the procedural norm universally followed by American courts. Having revealed Rule 183's aberrant nature, the second section of the brief details how its needlessly secretive procedure violates due process.

A. The Tax Court's Right to Use Special Trial Judges to Conduct Trials and Make Findings of Fact as Authorized by Congress Is Not in Dispute.

The Tax Court is authorized by Congress to hire "Special Trial Judges" ("STJs") to help manage its docket. *See* 26 U.S.C. § 7443A(a)-(b). These STJs are employees-at-will who serve at the pleasure of the Chief Judge of the Tax Court. *Id.* Tax Court Rule 183, as amended in 1984, authorizes Special Trial Judges to "conduct the trial" in cases assigned to them. Tax Ct. R. 183(a). As the lone judicial officer presiding at trial, the STJ has the power to "take testimony, conduct trials, rule on the admissibility of evidence, and . . . enforce compliance with discovery orders." *Freytag v. CIR*,

501 U.S. 868, 881-82 (1991). At the conclusion of trial, the STJ receives the parties' briefs and prepares a report, "including findings of fact." Tax Ct. R. 183(b). That report is then reviewed by a regular Judge of the Tax Court who may accept it, modify it, or reject it in whole or in part. *Id.* at 183(c). The regular Judge of the Tax Court must grant deference to the STJ's findings of fact, as Rule 183 dictates that "[d]ue regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct." Because they are "presumed to be correct," the STJ's fact-findings necessarily enjoy a legal status independent of any regular Tax Court Judge's view of the facts. None of this is unusual or remarkable, and the Petitioners certainly do not challenge the Tax Court's right to use STJs.

The fact-finding function is quite often separated from the ultimate power to render judgment. This is, of course, the very purpose of the jury trial. Even more analogous, special masters, administrative law judges, bankruptcy judges in non-core cases, and magistrates routinely sit as fact-finders and likewise prepare written findings, subject to review under deferential standards. Indeed, that process has been reviewed and approved by this Court, but with certain critical qualifications—including deference to the judge hearing the live testimony and judicial transparency—apparently lost on the Tax Court. *See United States v. Raddatz*, 447 U.S. 667, 681 (1980); *Peretz v. United States*, 501 U.S. 923, 939 (1991).

B. Since 1984, the Tax Court Has Inexplicably Refused to Make a Record of the Special Trial Judge's Fact-findings, Before or After They Are Altered.

Since 1984, the Tax Court has embarked down a unique path by which a STJ's original findings of fact are not made part of the record either before or after they are "rejected or modified" by a regular Tax Court Judge who was not present at trial and who did not observe any of the witnesses. Even in this civil fraud trial, requiring clear and convincing evidence, the Tax Court has assumed the right to change the outcome and the credibility determinations without recalling or observing witnesses, without recording that any change was even made, and without making any record explanation of why a change was made.[13] Indeed, under this revised rule, the Tax Court has not acknowledged "modifying" or "rejecting" any report of any STJ in any of the more than 880 cases decided under new Rule 183. *Kanter*, 337 F.3d at 876 (Cudahy, J., dissenting) ("Never, in any instance since the adoption of the current Rule 183 that I could find has the Tax Court Judge *not* agreed with and adopted the STJ's opinion."). Quite the contrary, every one of those decisions, like the decision in this case, simply purports to agree with and "adopt" the STJ's decision. *Id.* As Judge Cudahy observed, this unprecedented record of purportedly perfect agreement over the course of twenty years between all regular Tax Court Judges and STJs reveals the aberrant nature of the Tax Court's procedures: "I say with confidence that this degree of unanimity is not only unusual, but impossible in a system of arms-length appellate-style review involving 39 independent individuals." *Id.* In other words, Rule 183

[13] Notably, however, the Fifth Circuit concluded that even the Tax Court's revised opinion failed to identify evidence sufficient to satisfy the clear and convincing standard for the taxpayer before it. *Lisle*, 341 F.3d at 384-85.

necessarily masks a process under which Tax Court opinions contain, without acknowledgement, findings that differ from those reached by the judge who tried the case.

This is unprecedented and, as discussed in greater detail *infra* in Section II, so contrary to established procedural norms as to raise a presumption that the rule violates due process. *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994). Separately, and as explained more fully below, the refusal to allow the litigants and reviewing courts access to the original fact-finding (or to so much as offer a rationale for not doing so) violates the traditional three-part due process test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

C. None of the Shifting Explanations of the Tax Court's Conduct Withstands Scrutiny.

As noted, the secretive treatment of the original fact-finder's conclusions is unique to the Tax Court. Prior to 1984, the Tax Court's rules called for the original findings to be made of record and to be available for appellate review, as is true in virtually every other adjudicative process. Indeed, in *Stone v. CIR*, 865 F.2d 342, 347 (CADC 1989), the D.C. Circuit confirmed that regular Tax Court Judges were obligated to apply "clear error" review to the STJ's factual findings.

However, the Tax Court was evidently uncomfortable with the courts of appeals reviewing its own review of the STJ's Rule 183 report, and it instead sought to avoid this prospect by simply withholding the STJ's report from reviewing Article III courts—something it did without purporting to alter the deference it was bound to give the findings in those reports. In other words, despite the fact that the STJ's Rule 183 report continues to enjoy the independent legal status inherent in being "presumptively correct," it is now kept secret from the parties and the appellate courts—including this Court. This, of course, prevents an appellate court from

determining what, if any, level of deference the Tax Court gave to the STJ's report. Indeed, the Tax Court changed Rule 183 to accomplish exactly this. Regardless of the Tax Court's motives or lack of explanation for the change in its rules, the current version of the Rule 183 indicates that the reviewing judge may "adopt it ***or*** may modify it or may reject it in whole or in part." Tax Ct. R. 183(c) (emphasis added).

This Court has long indicated that U.S. district judges cannot constitutionally reject credibility determinations without recalling and personally observing witnesses—much less do so without even indicating that such a change has been made. *See Raddatz*, 447 U.S. at 681 n.7; *Peretz*, 501 U.S. at 939.

Indeed, in every other context in which disputed fact issues affecting property and liberty interests are resolved, there is a record of the finding of fact and a deferential standard applied to any subsequent alteration of that finding ***on the record***. Even the Tax Court concedes in its own rule that the original fact-findings must, as a matter of law, be given substantial deference because the reviewing judge was not present. Tax Ct. R. 183(c). What the Tax Court refuses to accept is that its own application of the standard of review applicable to fact-findings may itself be subjected to judicial scrutiny in the Article III courts.

Stated directly, the Tax Court's refusal to disclose the original fact-findings denies the litigants due process, violates the statute that both creates the Tax Court and provides that its decisions be reviewed in the same manner as decisions of the U.S. district courts, and ultimately encroaches on this Court's and the courts of appeals' power under Article III to review the Tax Court's decision.

The Tax Court's opinion, as issued to the parties and shared with the Article III courts, states on its face that Judge Dawson has simply "adopted" the opinion of Special Trial

Judge Couvillion. Pet. App. at 332. Given the limited options available to Judge Dawson (specifically, to "adopt" or "to modify" or "to reject" the STJ's original factfindings), it is reasonable to conclude that he did not reject or modify the fact-findings ***at some earlier point in time***.

In fact, however, it is now undisputed that, notwithstanding the claim of "adoption" that appears on the face of the opinion, the Rule 183 report was ***both*** "rejected" and extensively "modified," albeit for reasons that remain unknown to the parties and to this Court.[14] In other words, the fact-findings that Judge Dawson "adopted" were not the same—indeed, were radically different—from those that Judge Couvillion originally provided. Further, because of the off-the-record nature of the "rejection" and "modification" of the Rule 183 report, it is impossible for any reviewing Article III court to determine if Judge Dawson did indeed give "due regard" to Judge Couvillion's "presumed to be correct" fact-findings.

The IRS's explanation of the relationship between the STJ and the regular Tax Court Judge under Rule 183 and how this case and others are decided has steadily shifted over the course of this case—and sometimes within even the same brief. First, the IRS initially portrayed the STJ as little more

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[14] It is unclear from the text of Rule 183 whether the regular Tax Court Judge may simultaneously exercise more than one of his options for dealing with the Special Trial Judge's report. The Tax Court's precedents are of no help in confronting this question because, to the best of both Petitioners' and Judge Cudahy's ability to discern, the Tax Court ***always*** purports to "adopt" the STJ's report. *See Kanter*, 337 F.3d at 876 (Cudahy, J., dissenting) (". . . in the 880-plus Tax Court decisions since 1983 that I could find that involved an STJ report, the Tax Court Judge purported to agree with and adopt the opinion of the STJ in *every* instance. Never, in any instance since the adoption of the current Rule 183 that I could find, has a Tax Court Judge *not* agreed with and adopted the STJ's opinion.").

than a proxy for the absent regular judge who sits as the actual, albeit remote, fact-finder.[15] In the alternative, the IRS has also attempted to characterize the STJ as a "peer" to the regular Tax Court Judge, and has explained that the two judges together make the factual findings in an off-the-record judicial conference during which the regular trial judge somehow assists the STJ in arriving at credibility determinations.[16] The Eleventh Circuit accepted this latter explanation, noting that "there is nothing unusual about judges conferring with one another about cases assigned to them." *Ballard*, 321 F.3d at 1042-43.

While neither Congress nor Rule 183 clearly defines the relationship between an STJ and a regular Tax Court Judge, there are only three possible ways to conceptualize this relationship in the fact-finding context—and only one of

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[15] *See* Brief for the Respondent in Opposition to Petition for Writ of Certiorari at 11, n.2 (". . . the Tax Court Rules now make it clear that review by a regular judge of a special trial judge's report is not an appellate review ***but is an exercise of the regular trial judge's original fact-finding authority***") (emphasis added); Appellee's Brief in the Eleventh Cir. at 75-76 ("As the statute itself makes plain, a special trial judge assigned to the case . . . ***is not the finder of fact***, and is instead only an aide to the chief judge and the regular judge of the Tax Court to whom authority and responsibility for the case are assigned. . . . the special trial judge only makes recommendations to the chief judge and the regular judge of the court as to what facts should be found.") (emphasis added).

[16] *See* Brief for the Respondent in Opposition to Petition for Writ of Certiorari at 15 ("Nor do the communications that occur among judges with collaborative responsibility represent prohibited ex parte communications. . . . This form of collaborative judicial process, whether in the Tax Court or in other courts in which a shared decisional process occurs, does not violate Due Process."); Appellee's Brief in the Eleventh Cir. at 92-93 ("It would be peculiar in the extreme if a special trial judge were forbidden to consult with the regular judge who, as a matter of law, must decide the case.").

these ways is plausibly consistent with the Tax Court's own rules, due process, and the Article III rights of the parties and this Court:

1. *The STJ is fact-finder*. The STJ hears the evidence and makes the initial factual determination, which is then subject to deferential review by a regular Tax Court Judge and ultimately by the Article III courts, in much the same way that a federal district judge reviews a magistrate's fact-findings. This is the process that the plain language of Rule 183 calls for and is consistent with the D.C. Circuit's holding in *Stone*, 865 F.2d at 347 (holding that regular Tax Court Judges must apply "clear error" review to the STJ's factual findings).

2. *The STJ is not the fact-finder*. Rather, the STJ merely presides at trial as a sort of proxy for the regular Tax Court Judge, taking notes and making observations on his behalf. Based upon some combination of the STJ's secret report and a review of the trial transcript, the regular Tax Court Judge, and not the STJ, actually makes the "original" fact-findings, despite not attending the trial. This is one of the constructions of Rule 183 that the IRS advocates.

3. *The STJ's Report is only an initial credibility proposal*. The STJ and the regular Tax Court Judge, who is absent from the trial, are "peers" who confidentially collaborate after the conclusion of trial to jointly make the credibility determinations. The two judges confer about the facts and credibility in confidence, in a manner analogous to two appellate judges sitting on the same panel and deciding difficult issues of law. This is the explanation of the STJ-Tax Court Judge interaction that the Eleventh Circuit ultimately accepted. *Ballard*, 321 F.3d at 1042-43.

Regardless of which explanation the IRS ultimately offers, the analysis is, in the final measure, unchanged: because of the Tax Court's refusal to reveal the original fact-findings, the taxpayer is denied due process, the strong policy in favor of judicial transparency is ignored, and meaningful Article III appellate review is thwarted. Specifically, by maintaining strict secrecy surrounding the STJ's fact-finding report, the Tax Court's procedure violates the following universally accepted procedural norms: (1) fact-finding must be made on the record, (2) credibility determination should rarely, if ever, be reversed by someone who was not present at trial, (3) none, including the judge, should have *ex parte* contact with the fact-finder prior to the announcement of the factual conclusions, and (4) meaningful judicial review of the decisions of an Article I court by an Article III court must be possible.

1. *It Is Impossible to Determine if the Tax Court Judge Gave Proper Deference to the STJ's Credibility Determinations, Thus Denying the Taxpayer Meaningful Article III Review.*

The most straight-forward reading of Tax Court Rule 183 is that the STJ makes fact-findings subject to appellate-style review by a regular Tax Court Judge. In reviewing the STJ's fact-findings, the regular Tax Court Judge is obligated to give "due regard" to the STJ's unique status as the only judge to have had "the opportunity to evaluate the credibility of the witnesses." Tax Ct. R. 183(c). Indeed, the plain language of the Rule 183 mandates that the STJ's fact-findings "shall be presumed to be correct." The D.C. Circuit has held that the reviewing Tax Court Judge is to apply the deferential "clear error" standard of review. *Stone*, 865 F.2d at 347. While the Eleventh Circuit disagreed and concluded that the reviewing Tax Court Judge does not need to apply the clear error standard to the STJ's fact-findings, in light of the express

language of Rule 183,[17] it is indisputable that ***some level*** of deference ("due regard") must be given to the STJ's report.

In short, under this reading, Rule 183 is, in part, consistent with the universal practice of American courts that credibility determinations made by the trier of fact, whether a judge or jury, are to be given great respect and are rarely, if ever, to be altered by a judge who was not present at trial. Indeed, save for the inexplicable secrecy with which the STJ's report is treated, this interpretation of Rule 183 yields a system closely analogous the federal district courts' use of magistrate judges.

Nonetheless, even this understanding of Rule 183 is problematic, because without access to the STJ's report, it is utterly impossible for a reviewing Article III court to determine if the regular Tax Court Judge gave proper deference—or any deference at all—to the STJ's presumptively correct factual findings. Without a copy of the STJ's report, it is not possible to know which, if any, of the STJ's fact-findings the reviewing Tax Court Judge changed. In other words, the veil of secrecy that shrouds the STJ's initial fact-findings denies taxpayers Article III review in practice, if not in name.

2. *Once Authorized by Congress, Article III Review Cannot Be Hampered by the Unilateral Action of the Non-Article III Court.*

Congress has given taxpayers the right to have their Tax Court cases reviewed by Article III courts "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." 26 U.S.C. § 7482(a)(1). With Congress having granted taxpayers the right to seek Article III review of the Tax Court's decisions,

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[17] ". . . the findings of fact recommended by the Special Trial Judge shall be presumed to be correct." Tax. Ct. R. 183(c).

the Tax Court may not unilaterally strip that right away. Yet, the Tax Court has done just that by making this Congressionally mandated review impossible by virtue of its aberrant procedure.

Further, all parties who come into conflict with the federal government have a right to effective review by an Article III court. Even in so-called "public rights" cases, this Court has upheld the use of Article I courts *only* insofar as the private parties have been given the statutory right to appeal to an Article III court. *See, e.g., Crowell v. Benson*, 285 U.S. 22, 54 (1932) (upholding Article I adjudication of claims under Longshoremen's and Harbor Workers' Act because review by Article III court was possible); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 592 (1985) (upholding Article I adjudication of FIFRA claims because "FIFRA at a minimum allows private parties to secure Article III review of the arbitrator's 'findings and determination' for fraud, misconduct, or misrepresentation"); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85, 87 (1982) (holding that Article III review of the bankruptcy court under the "clearly erroneous" standard was not rigorous enough to save the statute); *id.* at 70 n.23 (noting that "[even] when Congress assigns ['public rights'] matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Article III judicial review"); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853 (1986) (upholding a CFTC adjudicatory scheme after noting that Congress permitted meaningful judicial review).[18]

[18] *See also* Richard H. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARVARD L. REV. 915, 933 (1988) (concluding that meaningful judicial review in an Article III court is required by the Constitution); Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 BOSTON U. L. REV. 85, 135, 149 (1988) (asserting that judicial review by an Article III court is a necessary but insufficient requirement of any delegation of judicial power).

Effective appellate review requires that the appellate court have access to the original and unaltered factual findings, as made by the person or persons making such findings. Without a record of a jury's unrevised verdict, for example, no appellate court could possibly conduct an effective review of a trial judge's grant of judgment as a matter of law. This principle is so obvious that citations are unavailable: prior to the Tax Court's change in practice in 1984, no American court had ever attempted to keep original fact-findings secret. As Judge Cudahy said, "No court of which I am aware has ever considered the ramifications of an agency's swallowing and refusing to regurgitate a preliminary factual finding in the manner done by the Tax Court here." *Kanter*, 337 F.3d at 886 (Cudahy, J., dissenting).

Indeed, in interpreting the Administrative Procedure Act, this Court concluded that, when reviewing a decision from the National Labor Relations Board, the record that the Article III court is provided must include the fact-finding report prepared by the examiner and reviewed by the Board. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951) ("Surely an examiner's report is as much a part of the record as the complaint or live testimony."). The statute at issue in this case, 26 U.S.C. § 7482, requires no less.

It is beyond dispute that when the courts of appeals review decisions of "district courts in civil actions tried without a jury," they are able to examine the original fact-findings of the district court or any subordinate fact-finder (such as, for instance, a magistrate judge). Under Rule 52(a) of the Federal Rules of Civil Procedure, the district judge must "find the facts specially and state separately its conclusions of law thereon." Paralleling Tax Court's Rule 183, Rule 52(a) also requires that "[f]indings of fact . . . shall not be set aside

unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge . . . the credibility of the witnesses."

Where a district judge has employed the services of a magistrate or special master in a bench trial, no appellate court would tolerate the district judge's attempt to revise or manipulate the factual findings behind the scenes, without ever apprising the appellate court of the original findings. It would also be impossible for a district judge to simply keep the magistrate's original findings secret, whether or not those findings had ever been changed. Such actions would be inconceivable, and would self-evidently render effective appellate review impossible.[19] *Cf. Universal Camera*, 340 U.S. at 493. Similarly, the fact-finding reports prepared by federal bankruptcy judges must be disclosed to the district court and shared with the parties. FED. R. BANKR. P. 9033.

[19] Indeed, there has long been a debate over what standard of review should be applied by the appellate court where a district court has disagreed with another fact-finder (such as a master). *See Stone*, 865 F.2d at 347-48 (discussing the conflict); STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, 1 FEDERAL STANDARDS OF REVIEW, at § 2.03C (1999) (same). Most courts have held that the appellate court should ignore the intermediate step (*i.e.*, the district court) and review the original fact-finder's results *directly*. *See, e.g., Morris Plan Indus. Bank v. Henderson*, 131 F.2d 975 (CA2 1942) (Hand, J.); *Gottlieb v. Barry*, 43 F.3d 474, 486-87 & n.9 (CA10 1994) (holding that district court must respect a master's determination if it is "similar to a credibility finding"); *Cook v. Niedert*, 142 F.3d 1004, 1009-12 (CA7 1998); *In re Multiponics, Inc.*, 622 F.2d 709, 723 (CA5 1980); *O'Rieley v. Endicott-Johnson Corp.*, 297 F.2d 1, 4-5 (CA8 1961); *Lines v. Falstaff Brewing Co.*, 233 F.2d 927, 930 (CA9 1956). A few courts, on the other hand, have given more deference to the district court's views. *See, e.g., Milliken Research Corp. v. Dan River, Inc.*, 739 F.2d 587, 592-93 (Fed. Cir. 1984); *United States v. Twin City Power Co.*, 248 F.2d 108, 112 (CA4 1957). Crucially, however, this entire debate would be absolutely impossible unless everyone took for granted that the appellate court must, at the very least, be informed of ***what the original fact finder's conclusions were***.

When it guaranteed Article III review of the decisions of the Tax Court, Congress was presumptively aware of the universal practice of providing the appellate courts with a copy of the trier of facts' findings. Congress did nothing to exempt the Tax Court from this procedural norm. Quite the opposite, Congress's enactment of 26 U.S.C. § 7482(a)(1) explicitly guaranteed that a taxpayer's case is to be reviewed "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury"—and it is undisputed that an appellate court has access to all fact-findings made by the trier of facts in the district court. Thus, consistent with *Universal Camera* and this universal procedural norm, 26 U.S.C. § 7482 implicitly insures the appellate courts access to the STJ's report.

3. *A Reviewing Article III Court Must Be Able to Determine if the Tax Court Gave Proper Deference to the STJ's Findings of Fact.*

The D.C. Circuit held in *Stone*, 865 F.2d 342, that the combination of Section 7482 and Tax Court Rule 183 (then labeled Rule 182) required (1) the Tax Court to apply a clear error standard of review to the Special Trial Judge's findings and (2) the court of appeals to apply clear error review to the Tax Court's own review process. *Stone*, 865 F.2d at 348. The court said:

> If a simple "preponderance" of the evidence—half plus a little bit—suffices to overturn the factual findings of a Special Trial Judge, then it is difficult to see what value or force attaches to the presumptive correctness of that judge's factual determinations, much less the "due regard" owed "to the circumstance that the [Special Trial Judge] had the opportunity to evaluate the credibility of witnesses."

Id. at 347.

In other words, when an Article III court of appeals is reviewing a Tax Court decision, it must assure itself that the

Tax Court has not committed any clear error in its own review of the Special Trial Judge's report. This sort of Article III review is absolutely impossible, however, where the Tax Court refuses to let the court of appeals view the Rule 183 report.

While the STJ was the only person in a position to make credibility determinations in a fraud case involving fifty-five witnesses, the Tax Court refused to make the initial findings of Judge Couvillion available to the Eleventh Circuit, even on a sealed basis. The Tax Court simply declared that "Judge Dawson gave ***due regard*** to the circumstance that Special Trial Judge Couvillion evaluated the credibility of witnesses." T.C. Order, Pet. App. at 315a (emphasis added). Respectfully, the Tax Court's "take our word for it" stance is not enough; the appellate court must be allowed to see for itself how much "regard" Judge Dawson actually gave to Judge Couvillion's original credibility findings. Only when armed with a copy of the Rule 183 report can the appellate court answer the questions that it is obliged to ask: Did Judge Dawson apply the correct standard of review to the STJ's factual findings? Did he apply that standard of review correctly? Did Judge Dawson make credibility assessments contrary to those made by Judge Couvillion? If Judge Dawson did reverse Judge Couvillion's credibility assessments, was this reversal based on something that appeared in the record or something else? Were Judge Dawson's contrary credibility assessments based on adequate record evidence? Self-evidently, none of these essential appellate questions can be answered so long as Judge Couvillion's report is kept secret by the Tax Court.

Thus, while Congress and the Constitution have given taxpayers the right to have their case reviewed by Article IH judges "in the same manner and to the same extent as decisions of the district courts in civil cases tried without a jury," 26 U.S.C. § 7482, that review cannot meaningfully

occur when the Tax Court hides a report that in any other American court would be part of the public record. In sum, by establishing its secret procedures under Rule 183, the Tax Court has unilaterally undermined the plainly-expressed intent of Congress. This is manifestly improper, and the Tax Court should be compelled to comply with 26 U.S.C. § 7482. Fortunately, the mere disclosure of the STJ's Rule 183 report to the parties and the reviewing courts would achieve such compliance.

D. Because Fact-finding May Not Be Made By Proxy, the STJ Must Be Regarded as the Original Finder of Fact and Not a Mere Stenographer for the Absent Regular Tax Court Judge.

The second explanation put forward by the IRS for the Tax Court's fact-finding procedure under Rule 183 is that the regular Tax Court Judge, informed by the STJ's secret report and, possibly, the trial transcript, actually makes the "initial" fact-findings.[20] Under this analysis, the STJ is merely some sort of "aide" to the *bona fide* fact-finder, the absent-from-trial regular Tax Court Judge.[21] Similarly, the STJ's report is merely an internal court communication and thus enjoys the same status as, for example, a law clerk's "bench memo" to a judge. As an internal court document, the theory goes, the STJ's report is properly kept confidential. In other words, under this understanding of Rule 183, the "original" fact-findings are made by the regular Tax Court Judge, not the STJ, and the STJ's report is therefore of no real consequence to the parties or the appellate courts.

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[20] *See* Brief for the Respondent in Opposition at 11, n.2; Appellee's Brief in the Eleventh Circuit at 75-76.

[21] *Id.*

As described above, this is an explanation that the plain language of Rule 183 will simply not bear. Under Rule 183, the STJ's factual findings are "presumed to be correct" and thus enjoy legal status independent of and apart from any evaluation of the facts by a regular Tax Court Judge. In sharp contrast, a genuine internal court document, such as a law clerk memo or draft opinion, self-evidently lacks any independent legal status and is certainly not "presumed to be correct." In other words, because it defined the STJ's fact findings as presumptively correct in Rule 183, the Tax Court is now estopped from denying either that those fact-findings have legal authority or that they are a necessary part of the record.

Nor, indeed, does defining the STJ as an "aide" to the regular judge describe the reality before the Tax Court, in which the STJ is the ***only*** judge who conducts the trial, ruling on all evidentiary and other motions, taking all testimony, hearing and questioning the witnesses, and making findings of fact and conclusions of law. *Freytag*, 501 U.S. at 881-82.

Nonetheless, the Government has suggested this reading of Rule 183, under which while the STJ presided at trial and heard the testimony, he did so merely as a proxy for the absent fact-finder—the regular Tax Court Judge. To be sure, the judicial practice of assigning various administrative functions to subordinates is both routine and generally acceptable. Neither does anyone challenge that internal Court communications, such as drafts of opinions or a judge's notes, are properly kept confidential. No one would argue, for example, that parties have the right to see research memoranda or drafts prepared for a judge by his law clerk. Thus, it seems that the Tax Court believes that the STJ is no different from a law clerk; the STJ merely functions as an aide to the Tax Court Judge who is thereby relieved of the tedium of observing the witnesses. Under this conception of Rule 183, the STJ is not a "trial judge" in any real sense, but merely a sort of scribe taking notes on behalf of the

otherwise-occupied actual Tax Court Judge. This, of course, is precisely where the Tax Court has gone wrong.

It should be obvious that an opportunity to observe a witness is necessary to make a meaningful credibility determination. Likewise, "one of the essential elements of the determination of the crucial facts [to any case] is the weighing and appraising of testimony." *Holiday v. Johnston*, 313 U.S. 342, 352 (1941).[22] That is especially true where, as here, the central issue is a fact-bound question such as the presence of fraudulent intent.

Because of his unique proximity to the live testimony, the trier of fact's decision is always subject to a deferential standard of review, whether he wears the title judge, juror, magistrate, or "special trial judge." In jury trials, the verdict can be set aside only "where no rational juror could so find."[23] In bench trials, fact-findings may not be set aside absent "clear error."[24] In both settings, it is univers-

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[22] *See also Universal Camera*, 340 U.S. at 496 ("The significance of [the hearing examiner's] report, of course, depends largely on the importance of credibility of witnesses."); *Morgan v. United States*, 298 U.S. 468, 481 (1936) ("That duty cannot be performed by one who has not considered evidence or argument. . . . The one who decides must hear."); *Gottlieb*, 43 F.3d at 486-87 & n.9 (holding that district court must respect a master's determination if it is "similar to a credibility finding"); *United States v. Marshall*, 609 F.2d 152, 155 (CA5 1980) (only in a "rare case" should a district judge resolve credibility choices in manner contrary to recommendation of magistrate who heard witnesses' testimony); *Bennerson v. Joseph*, 583 F.2d 633, 641 (CA3 1978) (district court serves in a reviewing capacity and should not displace master's view of witnesses' credibility); *Nat. R.R. Passenger Corp. v. Koch Indus., Inc.*, 701 F.2d 108, 111 (CA10 1983) (discussing importance of respecting a master's determinations that are "similar to a credibility finding").

[23] *E.g., Boeing Co. v. Shipman*, 411 F.2d 365 (CA5 1969) (en banc) (civil); *Jackson v. Virginia*, 443 U.S. 307 (1979) (criminal).

[24] *Barnett Bank v. Gallagher*, 43 F.3d 631, 633 (CA11 1995), *rev'd on other grounds*, 517 U.S. 25 (1996).

ally accepted that credibility assessments cannot be second-guessed by those who were not present.[25]

There can be no doubt that seeing a witness testify live assists the finder of fact in evaluating the witness's credibility. As this Court stated in *Anderson v. Bessemer City*, 470 U.S. 564 (1985): "[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.* at 575. Live testimony enables the finder of fact to see the witness's physical reactions to questions, to assess the witness's demeanor, and to hear the tone of the witness's voice—matters that cannot be gleaned from a written transcript. This is not only true of the federal system. It is equally true in all fifty states. 5 C.J.S. *Appeal and Error* § 781 (1993) (compiling state rules and cases).

The fact-finding function is not one that could be assigned to a law clerk or other court staff on behalf of an absent judge. This is indisputable. For example, it would rightly create a scandal for a judge to leave the courtroom during a bench trial and place his law clerk on the bench, with instructions to take notes and report back to him on who was telling the truth. Deciding who is lying and who is telling the truth is a fundamentally difficult task, particularly in a fraud case such as this, that simply cannot be accomplished by proxy, at a distance, or from a cold record.[26] Yet, under this understanding of Rule 183, the Tax Court proposes to engage in precisely this sort of absentee fact-finding-by-proxy.

In *United States v. Raddatz*, 447 U.S. 667 (1980), this Court upheld the constitutionality of the Magistrates Act only

[25] *United States v. Mejia*, 69 F.3d 309, 315-16 (CA9 1995); *Henson v. CIR*, 835 F.2d 850, 853 (CA11. 1988).

[26] *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("Particularly where credibility and veracity are at issue . . . written submissions are a wholly unsatisfactory basis for decisions.").

because there was no reason to believe that credibility determinations had been rejected. In that case, a federal district judge had upheld a magistrate's finding that a criminal defendant had confessed voluntarily. In doing so, the judge had not recalled the witnesses to repeat their testimony. In rejecting due process and Article III objections, a plurality of the Court explicitly noted that it was ***not*** confronted with a district court rejecting a magistrate's fact-finding without personally observing the witnesses. *Raddatz* at 681 n.7. "To do so," observed the Court, "without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions [beyond the question presented]." *Id.* Indeed, this concern was not only noted by the plurality in *Raddatz*, it was also the central feature of the concurring and dissenting opinions, joined collectively by five Justices, all of whom apparently agreed that the Due Process Clause would never permit a district court to reject a magistrate's credibility finding without personally observing the witness or witnesses.[27]

Subsequent decisions of this Court have continued to assume, and decisions of the lower courts have held, that a federal district judge may not constitutionally substitute his credibility determinations for those of the magistrate judge

[27] *See Raddatz*, 477 U.S. at 684 (Blackmun, J., concurring) ("I would distinguish between instances where the district court rejects the credibility-based determination of a magistrate and instances, such as this one, where the court adopts a magistrate's proposed result."); *Id.* at 686-87 (Powell, J., concurring in part and dissenting in part) (arguing that where credibility issues are concerned, the Article III judge must conduct his own hearing of the witnesses whether or not he wishes to reverse the magistrate); *Id.* at 691 (Stewart, J., joined by JJ. Brennan and Marshall) (arguing that the district judge could *never* decide a motion to suppress "without being exposed to the one kind of evidence that no written record can ever reveal—the demeanor of the witnesses.").

who observed the live testimony.[28] The rule applies equally in civil and criminal settings. *See, e.g., Parker v. Heckler*, 763 F.2d 1363, 1365 n.2 (CA11 1985); *Zand v. CIR*, 143 F.3d 1393, 1400 n. 15 (CA11 1998) (quoting the Tax Court). Similarly, where a case has been tried to the bench and the judge who heard the case below is no longer available on remand, the new judge will normally be required to recall and hear each of the witnesses himself. *See, e.g., United States v. Mitchell*, 187 F.3d 331, 332-33 (CA3 1999). Even the Tax Court acknowledges this. *Zand*, 143 F.3d at n.15.

In sum, to the extent that Tax Court Rule 183 reduces the STJ to the role of a mere tape recorder operator or note-taker for the regular Tax Court Judge, who makes the "actual" fact-findings, it offends due process. As the only judicial officer to have heard the testimony and observed the witnesses, the STJ is the only person in position to make constitutionally valid credibility determinations. This is not, of course, to argue that a regular judge of the Tax Court is not entitled to review the STJ's factual findings, provided it is the STJ who, in the first instance, made those findings. Further, the regular Tax Court Judge's review should be undertaken under some deferential standard, or at least in a way that allows the Article III appellate courts to know what findings were made by the judge who actually tried the case and observed the witnesses. But, in all events, it must be the STJ and not the absent Tax Court Judge, who makes the "original" fact-findings.

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[28] *See Peretz*, 501 U.S. at 939 (observing that, in some cases, the magistrate's determination might "turn[] on the credibility of witnesses" and noting that "[w]e presume, as we did in *Raddatz* when we upheld the provision allowing reference to a magistrate of suppression motions, that district judges will handle such cases [*i.e.*, cases hinging on credibility findings] properly if and when they arise."); *Louis v. Blackburn*, 630 F.2d 1105, 1109-10 (CA5 1980); *United States v. Cofield*, 272 F.3d 1303, 1305-06 (CA11 2001).

E. To the Extent that the Tax Court's Findings of Fact Are the Product of Some Sort of "Judicial Conference" or "Collaborative Effort" Between the STJ and the Regular Tax Court Judge, Due Process Is Again Violated.

The final characterization offered by the IRS of the relationship between the STJ and the regular Tax Court Judge under Rule 183 is that they are peers who confer and collaborate to produce the Tax Court's findings of fact. This is the characterization that the Eleventh Circuit ultimately accepted, noting,

> [w]hile the procedures used in the Tax Court may be unique to that court, there is nothing unusual about judges conferring with one another about cases assigned to them. These conferences are an essential part of the judicial process when, by statute, more than one judge is charged with the responsibility of deciding the case.

Ballard, 321 F.3d at 1042-43. The Eleventh Circuit also observed that "as a result of such conferences, judges sometimes change their original position or thoughts." *Id.* at 1043. Thus, under this understanding of Rule 183, although only the STJ attends the trial and hears the evidence, the STJ and the Regular Tax Court Judge are jointly responsible for making the "original" fact-findings through conference and discussion.[29]

The due process problems inherent in this interpretation of Rule 183 are manifest and numerous.

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[29] *See* Brief for the Respondent in Opposition to Petition for Writ of Certiorari at 15 ("Nor do the communications that occur among judges with a collaborative responsibility represent prohibited ex parte communications . . internal communications among judges and special trial judges are part of the internal deliberative process of the court.").

1. Ex Parte *Contact Between the Finder of Fact and the Judge Is not Helpful to Fact-finding and Injects Uncertainty and Confusion Over Why the Credibility Determinations Were Made the Way They Were.*

Under the IRS's most recent professed understanding of Rule 183,[30] the only possible fact-finder's conclusions must be revealed *ex parte* to the judge, who may then "correct" them as he sees fit, all entirely off the record. In other words, the Eleventh Circuit's ruling not only permits but requires *ex parte* contact between the finder of fact (the STJ) and the judge before the finder of facts' conclusions are disclosed and without the creation of any record of either the original fact-findings or the *ex parte* contact.

However, because the STJ is the only Tax Court judicial officer to hear the testimony and observe the witnesses, he is the only constitutionally permissible finder of fact at a Tax Court trial. *See Raddatz*, 447 U.S. at 681 n.7; *Peretz*, 501 U.S. at 939. It is undisputed that neither the Chief Judge nor the regular Tax Court Judge assigned to this case attended the trial. Neither is either obligated by any statute or rule to read the trial transcript. It is also undisputed that the STJ is an employee-at-will of the Tax Court. Pursuant to the express language of Rule 183, the function of the Tax Court Judge is to review the STJ's report and ensure that the law is properly applied and that the factual conclusions are not clearly erroneous. While a conference between peer judges concerning legal issues is certainly permissible, the IRS has never offered any explanation as to what, if anything, the absent reviewing judge could possibly add to the ***factual***

[30] *See* Brief for the Respondent in Opposition to Petition for Writ of Certiorari at 15 (characterizing the regular Tax Court Judge's off-the-record review and correction of the STJ's fact-findings as "collaborative judicial process").

determination of whether the live trial testimony is credible. Nor has the IRS explained why the same judge who is reviewing the STJ's fact-findings for "clear error" or with "due regard" should be involved in making those findings at the outset. Worse still, without any record of that judge's role, all this process creates is confusion and mystery as to why the facts were decided as they were.

The assertion that the Tax Court is permitting—much less requiring—secret *ex parte* contact between the finder of fact and the judge is without precedent in any forum where disputed issues of fact—much less assertions of fraud—are tried. Quite to the contrary, in the federal system there exists a clear and long-standing prohibition against the trial judge even discussing the fact issues with the jurors before their verdict (*i.e.*, the jury's fact-finding) has been announced. *E.g.*, *United States v. United States Gypsum Co.*, 438 U.S. 422, 459-62 (1978); *United States v. Cowan*, 819 F.2d 89, 93-94 (CA5 1987) (reversing conviction where judge engaged in *ex parte* communications with jurors); *United States v. Yonn*, 702 F.2d 1341, 1345 (CA11 1983) (discussing significance of adequate record to access role of *ex parte* contact). This prohibition is rooted firmly in due process. *E.g.*, *United States v. Frazin*, 780 F.2d 1461, 1469 (CA9 1986); *Delgado v. Rice*, 67 F. Supp. 2d 1148, 1157-58 (C.D. Cal. 1999).

Similarly, *every* state judicial system (by rule or court decision) has also prohibited *ex parte* communications between judges and jurors while fact issues are in play.[31] Indeed, state

[31] *Matthews v. Liberty Mut. Ins. Co.*, 243 So. 2d 703 (Ala. 1971); *Frontier Cos. v. Jack White Co.*, 818 P.2d 645 (Alaska 1991); *Perkins v. Komarnyckyj*, 834 P.2d 1260 (Ariz. 1992); *Coran v. Keller*, 748 S.W.2d 349 (Ark. 1988); *Halada v. Venice Lake Park, Inc.*, 283 P.2d 42 (Cal. Ct. App. 1955); *Kimmins v. City of Montrose*, 151 P. 434 (Colo. 1915); *Aillon v. State*, 363 A.2d 49 (Conn. 1975); *Loatman v. Patillo*, 401 A.2d 91 (Del. 1979); *Sears Roebuck & Co. v. Polchinski*, 636 So. 2d 1369 (Fla. Dist. Ct. App. 1994); *Gibson v. Gibson*, 187 S.E. 155 (Ga. Ct. App. 1936); *State v.*

courts often take the view that such conduct is reversible without objection[32] and so serious that harm is to be presumed.[33] Again, both of these conclusions stem from the fact

Estrada, 738 P.2d 812 (Haw. 1987); *Rueth v. State*, 596 P.2d 75 (Idaho 1978); *Gale v. Hoekstra*, 375 N.E.2d 456 (Ill. App. Ct. 1978); *Rogers v. R.J. Reynolds Tobacco Co.*, 745 N.E.2d 793 (Ind. 2001); *Ragee v. Archbold Ladder Co.*, 471 N.W.2d 794 (Iowa 1991); *Scales v. St. Louis-San Francisco Ry.*, 582 P.2d 300 (Kan. Ct. App. 1978); *Goode v. Campbell*, 77 Ky. 75 (1878); *Jones v. Black*, 676 So. 2d 1067 (La. 1996); *Greely v. Weaver*, 5 A. 267 (Me. 1886); *Smith v. State*, 505 A.2d 564 (Md. Ct. Spec. App. 1986); *Commonwealth v. DeJesus*, 691 N.E.2d 234 (Mass. App. Ct. 1998); *People v. France*, 461 N.W.2d 621 (Mich. 1990); *Booth v. Spindler*, 110 N.W.2d 889 (Minn. 1961); *Boedges v. Dinges*, 428 S.W.2d 930 (Mo. Ct. App. 1968); *Gulf Hills Dude Ranch, Inc. v. Brinson*, 191 So. 2d 856 (Miss. 1966); *State Highway Comm'n v. Dunks*, 531 P.2d 1316 (Mont. 1975); *Taulborg v. Andresen*, 228 N.W. 528 (Neb. 1930); *Isbell v. State*, 626 P.2d 1274 (Nev. 1981); *State v. Bailey*, 503 A.2d 762 (N.H. 1985); *Guzzi v. Jersey Cent. Power & Light Co.*, 115 A.2d 629 (N.J. Super. Ct. App. Div. 1955); *Amador v. Lara*, 603 P.2d 310 (N.M. Ct. App. 1979); *Linke v. Savage*, 333 N.Y.S.2d 600 (N.Y. App. Div. 1972); *Sheff v. Conoco, Inc.*, 311 S.E.2d 14 (N.C. Ct. App. 1984); *Kronberger v. Zins*, 463 N.W.2d 656 (N.D. 1990); *Bostic v. Connor*, 524 N.E.2d 881 (Ohio 1988); *Osage Mercantile Co. v. Harris*, 152 P. 408 (Okla. 1915); *Hastings v. Top Cut Feedlots, Inc.*, 590 P.2d 1210 (Or. 1979); *Glendenning v. Sprowls*, 174 A.2d 865 (Pa. 1961); *Amica Mut. Ins. Co. v. Tashjian*, 703 A.2d 93 (R.I. 1997); *State v. Dawkins*, 232 S.E.2d 228 (S.C. 1977); *Gilbert v. Caffee*, 293 N.W.2d 893 (S.D. 1980); *Guy v. Vieth*, 754 S.W.2d 601 (Tenn. 1988); *Conrey v. McGehee*, 473 S.W.2d 617 (Tex. Civ. App.-Houston [14th Dist.] 1971, writ ref'd n.r.e.); *Johnson v. Maynard*, 342 P.2d 884 (Utah 1959); *State v. Loso*, 559 A.2d 681 (Vt. 1989); *Ellis v. Commonwealth*, 317 S.E.2d 479 (Va. 1984); *Iverson v. Pacific Am. Fisheries*, 442 P.2d 243 (Wash 1968); *Klesser v. Stone*, 201 S.E.2d 269 (W.Va. 1973); *State v. Burton*, 334 N.W.2d 263 (Wis. 1983); *Carlson v. Carlson*, 888 P.2d 210 (Wyo. 1995).

[32] *Smith v. State*, 505 A.2d 564 (Md. Ct. Spec. App. 1986); *People v. France*, 461 N.W.2d 621 (Mich. 1990).

[33] *Rogers v. R.J. Reynolds Tobacco Co.*, 745 N.E.2d 793 (Ind. 2001); *Glendenning v. Sprowls*, 174 A.2d 865 (Pa. 1961); *Guy v. Vieth*, 754 S.W.2d 601 (Tenn. 1988).

that *ex parte* communications between a judge and jurors are inherently inconsistent with due process. *E.g.*, *State v. McGinnes*, 967 P.2d 763, 769-70 (Kan. 1998); *Guzzi v. Jersey Cent. Power & Light Co.*, 115 A.2d 629, 634-35 (N.J. Super. Ct. App. Div. 1955).

The prohibition on *ex parte* contact between finders of fact and those who supervise their work extends beyond the traditional judge-and-jury courtroom context. Indeed, it is universal. United States magistrate judges, for example, must disclose their decisions to the parties before they are reviewed or corrected by a federal district judge, and the parties are given the opportunity to object to the magistrate's findings.[34] 28 U.S.C. § 636(b)(1)(c); FED. R. CIV. P. 72 and 73. Similarly, the drafters of the Administrative Procedures Act ("APA") made it perfectly clear that when an Administrative Law Judge ("ALJ") has considered the evidence and reached a factual conclusion or recommended a decision, his finding or recommendation was to be shared with the parties ***before*** any outside influence was brought to bear by his superiors. 5 U.S.C. § 557(c) ("[a]ll decisions, ***including initial, recommended and tentative decisions***, are a part of the record") (emphasis added) and § 557(d) (forbidding *ex parte* contact).[35] Thus, the APA rightly embraces the general rule

[34] In addition, in contrast to the situation in the Tax Court, Article III appellate courts obviously have access to a magistrate's initial fact-findings, as well as the federal district judge's reasons for changing those findings. Further, federal magistrate judges enjoy the protection of a defined term of office, 28 U.S.C. § 631(d), while the Tax Court's STJs are employees-at-will, and thus vastly more susceptible to pressure in the purportedly "collaborative" process. *See infra*.

[35] The drafters provided a limited exception for initial license applications where the agency rule required the entire record to be certified to it– cases that by definition do not involve existing property rights or equate to traditional adjudications.

that "[t]he one who decides must hear"[36]—with that decision made free of *ex parte* contact or outside influence.

Like a juror, an administrative law judge, or a magistrate judge, the STJ is alone in observing the witness and in determining, at least as an initial matter, whether testimony is to be credited. But, unlike any of these other fact-finders, the STJ is not insulated from *ex parte* contact prior to the release of his factual determinations. Even worse, the STJs' future employment and livelihood are entirely dependent on the good will of the Chief Judge. Nonetheless, under the IRS's theory and the Eleventh Circuit's ruling, the STJ is obligated to engage in a secret *ex parte* "conference" with a regular Tax Court Judge and to submit his factual findings for pre-release "correction." Thus, this interpretation of Rule 183 violates the universal American prohibition on *ex parte* contact between fact finder and judge.

2. *Any Collaborative Effort to Make Fact-findings by the Present-at-Trial STJ and the Absent-from-Trial Tax Court Judge Makes It Impossible to Know that the Decision Maker Observed the Testimony.*

In addition to exposing the finder of fact to *ex parte* pressure, classifying the Tax Court's fact-finding process as a behind-closed-doors collaborative effort between the present-at-trial STJ and an absent-from-trial Tax Court Judge makes it is impossible to verify that the person making the factual determinations heard the live testimony and observed the witnesses. To the extent that the absent-from-trial Tax Court Judge is given a voice in making original factual findings, rather than simply reviewing the findings made by the STJ, the universal principal, set forth above, that "[o]nly the trial judge can be aware of the variations in demeanor and tone of

[36] *Morgan v. United States*, 298 U.S. 468, 481 (1936).

voice that bear so heavily on the listener's understanding of and belief in what is said" is ignored.[37]

Further, making fact-findings via an off-the-record collaborative process between the STJ and the Tax Court Judge makes meaningful appellate review impossible because it obscures the standard of review applied by the regular Tax Court Judge to the STJ's report. In other words, treating the fact-finding process at the Tax Court as a confidential judicial conference makes it impossible to know which factual determinations were made by whom, while rendering indeterminable the level of deference ("due regard") given to the STJ's report, as commanded by Rule 183, and making the court of appeals' own clear-error review of the findings of fact contained in the opinion impossible. *See Kanter*, 337 F.3d at 884-85 (Cudahy, J., dissenting) (noting that clear error review requires more deference be given to the judge who heard the witnesses; meaningful clear error review thus requires knowledge of which entity was the finder of each fact).

3. *No "Judicial Conference" Between the STJ and the Tax Court Judge Is Possible Because They Are not Peers.*

Finally, the Eleventh Circuit's decision to treat the Tax Court's Rule 183 fact-finding process as nothing more than a confidential "judicial conference" with the potential to "sometimes change [the STJ's] original position or thoughts"[38] ignores the critical fact that the STJ and the regular Tax Court Judge are in no way peers. Quite the contrary, the STJ is an employee-at-will of the Tax Court who, in a very real sense, is facing his employer when he "confers" with a regular judge of the Tax Court. Unlike a

[37] *Anderson*, 470 U.S. at 575.

[38] *Ballard*, 321 F.3d at 1043; Brief for the Respondent in Opposition to Petition for Writ of Certiorari at 15.

federal magistrate or bankruptcy judge, the STJ is not even protected by a fixed term of office.

While a conference between judicial peers, such as judges on a federal appellate court or another multi-judge panel of equals, serves an undeniably valuable purpose, there is simply no analogy to the secret meetings between employer and employee held at the Tax Court. At a minimum, an employee-at-will STJ is vastly more susceptible to pressure in a "conference" with his employer than any other type of judge in the federal system would be in a traditional judicial conference. Given the inherent inequality in their positions, STJs and regular Tax Court Judges are simply not capable of conferring in the same manner that peer judges do. *Kanter*, 337 F.3d at 887 (Cudahy, J., dissenting) ("The STJs are not equal to the Tax Court judges and it might be naive to assume that the STJs have an equal voice in the collaborative process that results in Tax Court opinions.").

Further, judges on a multi-judge panel have, as a general rule, all heard the same testimony or observed the same oral argument. As such, a conference allows them to compare perspectives and impressions based on their shared observations.

That is not the case here, where one of the "conferring" judges witnessed the trial and the other did not. Thus, the argument advanced by the IRS equates the Tax Court's Rule 183 procedure to some sort of "conference" between a trial judge and a judge of the court of appeals. In other words, even if the STJ and the Tax Court Judge were peers capable of conferring on equal terms, no meaningful conference between them is possible. Given that he did not attend the trial, it is entirely unclear what the regular Tax Court Judge could possibly say in conference to persuade the present-at-trial STJ to "change their original position or thoughts"[39] on the credi-

[39] *Ballard*, 321 F.3d at 1043.

bility of witnesses. Indeed, the absent-from-trial Tax Court Judge would seemingly have nothing to contribute to the sort of fact-finding conference envisioned by the Eleventh Circuit.

Finally, to the extent that an STJ's view of the facts does not prevail in the confidential "conference" with a regular Tax Court Judge, the STJ has no ability to publish a dissent or otherwise memorialize his objections—even if the STJ is bold enough to disagree with his employer. This is, of course, markedly different from any conventional judicial conference, such as among the judges of a court of appeals, in which every conferring judge has the ability to dissent on the record.

II. THE TAX COURT'S STRUCTURE OF ADJUDICATION VIOLATES DUE PROCESS.

Having established that, no matter how it is characterized, the Tax Court's Rule 183 procedure is fundamentally out-of-step with traditional and universally accepted American judicial practices, it is next necessary to examine how, specifically, it violates taxpayers' due process rights. The Tax Court's aberrant Rule 183 violates due process for two distinct reasons. First, consistent with the principle reiterated by this Court in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994), the Tax Court's radical departure from accepted American judicial norms raises the presumption of a due process violation. Second, and separately, Tax Court Rule 183 violates the traditional test for due process announced by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

A. Consistent with the Court's Holdings in *Oberg* and Elsewhere, the Tax Court's Unprecedented Procedure Presumptively Violates the Due Process Clause.

As established above, the Tax Court's Rule 183 procedure departs from the procedures used in every other state and federal court in America. This dramatic aberration gives rise

to a presumptive due process violation under the principal confirmed by this Court in *Oberg*, 512 U.S. at 430, which held that a material departure from well-established and traditional judicial procedures creates a presumptive due process violation.

It has long been the rule that a court's adherence to due process will be judged in large part by whether its practices are consistent with the rest of the American legal system. *See, e.g., Den ex dem. Murrey v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1856) (holding that where American constitutional law provides no answer to a due process question, the court should look to the "settled usages and modes of proceeding existing in the common and statute law of England"); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (same); *Powell v. Alabama*, 287 U.S. 45, 60-66 (1932) (conducting extensive analysis of colonial precedents related to the right to counsel).[40] "As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Oberg*, 512 U.S. at 430. "When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Id.*[41]

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[40] *See also* Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 325-35 (1957) (discussing the Court's use of historical analysis in procedural due process cases).

[41] The opposite is true as well: Where plaintiffs challenge procedures that have been universally deployed, the Court is reluctant to find a due process violation. *See, e.g., Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604, 611-16 (1990); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991) (noting that "every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process"); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988) ("'If a thing has been practiced for two hundred years by common consent, it will need a strong

Thus, for example, when the Court considered whether due process required that criminal violations be proved beyond a reasonable doubt, the Court found that the American judicial system's "virtually unanimous adherence" to this standard reflected a "profound judgment about the way in which law should be enforced and justice administered." *In re Winship*, 397 U.S. 358, 362 (1970) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)). In *Duncan*, the Court found a due process violation where one state departed from the universal practice of allowing jury trials for serious criminal offenses. 391 U.S. at 155. Similarly, in *Oberg*, the Court held that Oregon had denied due process by disallowing any appellate scrutiny of the size of punitive damage awards, basing its holding on the fact that appellate scrutiny was permitted in the federal system and in every state except Oregon. *Oberg*, 512 U.S. at 430, 432.

As discussed in detail above, the Tax Court's Rule 183 procedure departs in multiple material ways from the procedures used in every other American court: the Tax Court keeps the trier of facts' conclusions out of the record and denies the parties access to those conclusions; it allows the off-the-record reversal of credibility findings by someone not present at trial; it makes no record of the reason that the trier of facts' findings were changed; and it allows (indeed, apparently *requires*) confidential *ex parte* contact between the trier of fact and the judge—and in a situation where the judge is the trier of fact's employer.[42] These secretive procedures

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case for the Fourteenth Amendment to affect it.'") (quoting *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922)); *Snyder v. Massachusetts*, 291 U.S. 97, 111 (1934) ("The Fourteenth Amendment has not displaced the procedure of the ages").

[42] To be sure, the denial of a traditional procedural safeguard may be excused where the court has adopted an adequate substitute procedure. *Oberg*, 512 U.S. at 430-31. But the Tax Court has not even purported to adopt any procedure that would be an adequate substitute for the traditional practice by which the fact-finder's conclusions are, at the very

are unique to the Tax Court and are without precedent. As Judge Cudahy said in his dissent, the Tax Court avoids "procedural transparency in a circumstance where ***every other like process known to the law is transparent***." *Kanter*, 337 F.3d at 875 (Cudahy, J., dissenting) (emphasis added). The Tax Court's practice thus presumptively violates the Due Process Clause.[43]

Because it has not identified any legitimate public interest that is served by the Tax Court's policy of secrecy, the IRS has failed to rebut the presumption that the Tax Court's opaque fact-finding procedure violates due process. Indeed, aside from offering a flawed analogy to internal court communications, the IRS has yet to state a meaningful reason for concealing the Rule 183 report from the parties and reviewing courts. In contrast, no one would dispute that the public's interest in a transparent judicial process is both substantial and deeply-rooted. Hence, the undisputed public policy in favor of judicial transparency only serves to strengthen the *Oberg*-based presumption that due process is violated by the Tax Court's bizarrely secretive procedure.

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least, made public before they are subject to correction or review by a superior officer.

[43] Respondent might point to the fact that there exist few, if any, due process precedents that are precisely on point with the current case. Yet, this very lack of precedent is further confirmatory evidence that due process has been violated. The Court in *Oberg* observed that "[b]ecause the basic procedural protections of the common law have been regarded as so fundamental, very few cases have arisen in which a party has complained of their denial." *Oberg*, 512 U.S. at 430. Similarly, the Court observed in *Burnham* that the reason some jurisdictions lacked precedents on a particular due process issue was "because the issue was so well settled that it went unlitigated." *Burnham*, 495 U.S. at 613.

The present case involves principles of similarly unanimous lineage. The reason that there are few direct precedents for Petitioners' argument is precisely because the Tax Court's own practice is without precedent.

B. Quite Apart from the Presumption of Invalidity Under *Oberg*, the Balancing Test of *Mathews v. Eldridge* Also Requires Production of the Rule 183 Report.

Separate and independently, the Tax Court's refusal to produce the STJ's fact-findings also violates the traditional due process balancing test of *Mathews v. Eldridge*:

> [T]hree factors should be considered in determining whether the flexible concepts of due process have been satisfied: (a) the private interests implicated; (b) the risk of an erroneous determination by reason of the process accorded and the probable value of added procedural safeguards; and (c) the public interest and administrative burdens, including costs that the additional procedures would involve.

Raddatz, 447 U.S. at 677 (citing *Mathews*, 424 U.S. at 335). Each step of the *Mathews* analysis favors release of the STJ's Rule 183 report to the parties and reviewing courts.

First, the Ballards have a significant private interest in receiving fair and trustworthy appellate review in a civil fraud case. As Judge Cudahy noted in his dissent, the "quasi-criminal nature of fraud is a more significant private interest than a simple civil determination . . . ." *Kanter*, 337 F.3d at 886 (Cudahy, J., dissenting). Moreover, in some cases, even the IRS has an interest in gaining access to the Rule 183 report; if, for example, the STJ's original fact-finding had favored the IRS, only to be reversed without explanation by the regular Tax Court Judge, the IRS might well find itself championing the same position that the Petitioners do here.

Second, the risk of erroneous determination is at its apex where, as here, the appellate court is forced to speculate about what the original fact-finder thought before his views were subject to off-the-record lobbying or "correction" by his employer. As Judge Cudahy observed, "The precedents

noted in the administrative context . . . clearly demonstrate how valuable preliminary findings are for review in cases like the present one." *Id.* at 887. In simple terms, the lack of access to the Rule 183 report makes the appellate court's job harder and increases the odds of judicial error.

Third and finally, providing the parties with copies of the Rule 183 report would not violate any "public interest" or create any sort of "administrative burden." Quite the contrary, the costs involved would be exceedingly small–merely the *de minimus* cost of providing copies of the Rule 183 report to the parties and the appellate courts.[44] Again, the IRS has yet to even claim any legitimate public interest in keeping the STJ's report secret. In contrast, revealing the STJ's report to the parties, the public, and the appellate courts would obviously further the well-established public interest in judicial transparency, while maintaining secrecy undermines that interest. Indeed, it is difficult to conceive of what legitimate public interest could be furthered by the Tax Court's policy of secrecy. As Judge Cudahy put it: "This entire process of the Tax Court appears designed to extract the efficiencies involved in designating cases to be heard by STJs without having to bear any of the procedural costs traditionally associated with this kind of adjunct decision-making (*e.g.*, transparency)." *Kanter*, 337 F.3d at 887-88 (Cudahy, J., dissenting). Finally, the significant public interest in insuring adequate appellate review in all cases also is served by releasing the report.

In short, every element of the three-part *Mathews* test strongly indicates that the Tax Court's needlessly secret treatment of the Rule 183 report violates due process.

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[44] Indeed, the cost associated with producing a copy might even be assigned to the appellant as a cost of the appeal. *See, e.g.*, Proposed Amendment to Fifth Circuit Rule 30.1 (requiring party requesting the record to pay the cost of shipping it).

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be vacated in its entirety, and this case remanded for further proceedings consistent with this Court's opinion, including an order that the Rule 183 report of the Special Trial Judge be provided to the parties and made part of the appellate record.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Jan. 7, 2004]

No. 03-61075

In Re: ESTATE OF ROBERT W LISLE; ESTATE OF DONNA M LISLE; THOMAS W LISLE, Independent Co-Executor; AMY L ALBRECHT, Independent Co-Executor,
Petitioners,

Petition for Writ of Mandamus
to the
United States Tax Court

Before JOLLY, SMITH, and WIENER, *Circuit Judges*.

BY THE COURT:

IT IS ORDERED that the Petitioners-Appellants' Motion to Enforce This Court's Mandate, treated as a petition for writ of mandamus, is DENIED.

Although Petitioners-Appellants present a compelling case that, on remand from our opinion filed July 30, 2003, the Tax Court's stated intention to "add new penalties based on negligence, substantial understatement of income and tax-motivated interest" will exceed the strictures of our limited mandate, we remain mindful of the Supreme Court's admonition that mandamus is not to be used as a substitute for appeal. Despite the implication of the Tax Court's orders of November 19, 2003, and the inferences reasonably drawn

therefrom by Petitioners-Appellants, that Court has not issued its final judgment. Thus it is impossible to tell whether, on remand, the Tax Court will in fact exceed the narrow limits of our remand, which permits only a recalculation of tax in light of that portion of the Tax Court's original judgment that we reversed. If, in the certain knowledge that its impending judgment will be appealed and closely scrutinized to determine whether it exceeds our mandate on remand, the Tax Court does-as appellants suggest-"go much further," that contention can be dealt with in the appellate process. We trust that, in the final analysis, the Tax Court will not make yet another reversal necessary.

MOTION DENIED.